

Josiah Thwaites an Infant
(Son and Heir) of
James Thwaites Deceased
(who was Son and
Heir of *Will. Thwaites*
Deceased.)

Appellant.

John Dey and Frances
his Wife.

Respondents.

The Appellants CASE.

William Thwaites by Frances his Wife had Issue.

I
James Dead

2
Thomas Dead
without Issue.

3
Frances
Wife of *Dey*.

4
Martha Living.

I
Josiah the Appellant.

That *William Thwaites* (the Appellants Grandfather, and a Sea Captain) by a voluntary Settlement, by Lease and Release, dated the 11th. and 12th. of Decemb. 1678. conveyed the Mannor of *Berners-Rothing*, alias *Varnish-Hall*, in *Essex* (being above 200 l. per annum.) to Trustees, to the use of himself for life, Remainder to *Frances* his Wife for her life (charged with the payment of 50 l. per annum. to *James* his eldest Son) and late Father to the Appellant during their joint Lives) and from and after the decease of the survivor of them two for such Estate as the said *William* should by any writing under his Hand and Seal executed before two Witnesses appoint, and for want of such appointment to the use of *Thomas Thwaites* (second Son of the said *William* and *Frances*) and of their Heirs for ever. With a power of Revocation to the said *William Thwaites* and his said Wife, during their joint lives.

That the same day the Deeds were executed, the said *William Thwaites* took one part of the said Lease and Release, and sealed them up and delivered them to *Isaac Heath* (one of the Trustees) to keep.

That afterwards the said *William Thwaites* (being at Deal in Kent, and going to Sea, (pursuant to the power in the said Settlement) by a Will or Deed of Appointment dated the 21st. day of Aug. 1679 (all of his own hand writing) and Signed and Sealed in the presence of two Witnesses, devised in these words following, viz. I give to my Son *Thomas Thwaites* (after the death of my Wife *Frances*) 100 l. per annum, to be paid him out of the rent of *Varnish-Hall*, and to the Heirs of his body, and for want of such issue to Return to my Son *James Thwaites* and the Heirs of his body, he paying my two Daughters *Frances* and *Martha* 500 l. a piece out of that 100 l. a year that he enjoys by the death of my Son *Thomas*, and my Son *James* to pay the 1000 l. to my two Daughters within two years after the death of my Son *Thomas*.

That the said *William Thwaites* was about * April 1680, slain in fight with the Turks, and in August ** 1680. *Frances* his Widow and Executrix proved his Will (being the Will or Writing of Appointment aforesaid) and she died in the same month, and about 9 October 1681. *Thomas Thwaites* died without Issue, and † *Frances* the Daughter living in the house with her Mother till her death, and having all the Writings in her Custody, she after her Mothers death married one *Dey*, an Attorney at Law.

§ That after the said Marriage, viz. about Trinity Term 1682. the said *Dey* and his Wife exhibited a Bill in the Exchequer against *James Thwaites* (the Appellants Father, then an Infant) and against *Isaac Heath*, the surviving Trustee) and therein pretended that *William Thwaites* and his Wife being dead, and not having revoked, nor the said *William* made any other appointment of the premises according to the power in the said Settlement, and *Thomas* being dead without Issue, the premises were come to the said *Frances*, then the Wife of the said *Dey*, and her Heirs, but after the execution thereof the same was razed, and the name of *James* the eldest Son put instead of *Frances*.

¶ That the Appellants Father (by his Guardian) did by his Answer, say, That whether his said Father *William Thwaites* did make such Settlement as was mentioned in the said Bill, or any other Settlement whatsoever, was unknown to him, and that he hoped the Court (in whose Protection he was) would take such care that no unjust advantage might be taken against him, being under Age, and that he should not receive any prejudice in what was his right, whilst he was not able to defend himself.

That Mr. *Heath* the Trustee proved the Deed was not altered after it was delivered to him by Mr. *Thwaites* (who brought the Deed from the Temple immediately after the Sealing) and delivered it to the said Mr. *Heath*, without going home with it sealed up in paper, and that it was never opened till after the death of the said *William Thwaites*.

And it was also proved that after the death of *William Thwaites* and his Wife (when Mr. *Heath* first opened the Settlement, the same was razed, as now it appears to be. That it also appeared by the Deed that in the Engrossment there was at first a blank left for the date, and that the hand and ink in the razure is the same that filled up the date, and although there was not any proof that the Deed was razed after the execution thereof, nor was there produced any other part of the Settlement differing from it, and tho' the Trustee was prov'd to be a Man of unquestionable honesty, and it could not be presumed it could be done by, or for the sake of *James Thwaites* who was an Infant, and at Sea, and not known whether living or dead, when the Settlement was opened.

Nevertheless, the Court upon the first hearing directed a Tryal at Law, to try whether the Deed was razed after the execution thereof, or not, and on producing the first draught of the Deed (which it seems remained as at first drawn) and was omitted to be altered and made to agree with the Engrossment of the Deed, after the same had been altered and executed by the Parties (who had many meetings about the Settlement before they Sealed it.) The Jury without any actual proof presumed the razure to be made after the execution of the Settlement (but by whom could never tell) and thereupon the said *Dey* and his Wife obtained a Verdict, and afterwards had a Decree for the possession of the Estate, and to hold the same against *James Thwaites* (the Appellants Father) and all claiming under *William Thwaites* (the Appellants Grandfather) and a perpetual injunction was awarded against *James*, and that *James* when he came of Age should convey the Estate to *Dey* and his Wife (without giving *James* a day to shew cause when he should come of Age (and without any provision for the 100 l. per annum. limited to him by the said Will or Deed of Appointment, (which was concealed by the contrivance of *Dey*) and under this Decree *Dey* and his Wife enjoyed the Estate for several years.

That the Appellants Father being come of Age, and advised that the Decree was erroneous, and that although the Will or Deed of Appointment of his Father was not put in Issue in the cause in the Exchequer, and that he was by that Decree wholly deprived of the Estate that was limited to him by the Will or Deed of Appointment, and to which he would be entitled altho' the first Deed of Settlement had been really razed (as *Dey* and his Wife pretended) appealed to the most Honourable House of Lords against the said Decree.

That upon the 25th of April 1690, the said Decree was reversed to the intent the said *James Thwaites* might have a new Trial at Law if he thought fit.

That the Appellants Father apprehending their Lordships meaning to be that such Tryal should be on his whole Case (which had not been made out for him in the Court of Exchequer whilst he was an Infant) did in June 1690 bring an Action of Ejectment for trying of his whole Title to the said Lands, but *Dey* served his Attorney with an Injunction, granted by the Decree in the Exchequer, (which had been so reversed) as if the same had been in force, and prevented the Tryal.

That in July 1690, *James Thwaites* moved the Court of Exchequer that he might proceed in his Ejectment, but they would make no Order therein.

That *Martha Thwaites* Sister to *James*, for non payment of 500 l. given her by the said Will or Deed of Appointment obtained a Decree of Chancery (founded there upon against the now Respondents, to be paid what was due to her out of the said Lands, and by virtue thereof was put into the possession of the said Lands, against which Decree *Dey* appealed to the Lords in Parliament (pretending there was no such Will or Appointment) and on hearing the said Cause the Decree was affirmed, and *Dey* to pay 20 l. Costs, and yet by the Exchequer Decree *James Thwaites* when he should come of Age was to convey all his Estate in the said Lands to *Dey* and his Wife, whereby he would not only loose his Inheritance settled by the Deed, but also the 100 l. per annum given him by the Will or Appointment.

That *Martha* continuing in the possession of the said Lands, and *James Thwaites* being obstructed by *Dey* from trying his Title on the whole Case, and being beyond the Seas and *Dey* having (as is pretended) in the year 1685 Mortgaged the Estate in question with other Lands to the Lady *Bridgeman's* Trustees, they petitioned the Lords in Parliament that *James Thwaites* might try the Cause on the former Issue.

That on the 23d of May 1698 it was ordered by their Lordships that the Tryal should be had within a year then next (by which time it was supposed *James Thwaites* who was then in India would have come back) but the said *James Thwaites* dyed in his Voyage coming home, leaving a Widdow and the Appellant his Heir at Law and two Children more.

That upon a hearing before the Lords in Parliament upon the Petition of *Dey* and his Wife, and the Lady *Bridgeman* and her Trustees, and upon the Appellants whole Case, It was ordered by their Lordships on 23d of March 99, that the Appellant should try the Cause before the end of Michaelmas Term then next upon the former Issue, and that the Appellant should be allowed the benefit of the said Deed of Appointment.

That pursuant to the said Order, a very long Tryal hath been had at the Barr of the said Court of Exchequer by a Jury of Gentlemen, and on reading the said Will or Deed of Appointment, and on full Evidence on both sides and on the whole merits of the Appellants Cause (which was never before allowed to his Father) the Appellant hath obtained a Verdict, that the said Deed of Settlement dated the said 12th of December 1678, was not razed after the execution thereof, whereby the Appellant as he humbly apprehends is entitled to the full benefit of the said Settlement, and also of the said Will or Deed of Appointment against the said *Dey* and his Wife, and all claiming under them.

Wherefore it is humbly hoped, that the said Decree which was made on part of the Appellants Fathers Case only, and (whereby he was excluded from the benefit of the said Will or Deed of Appointment) shall be absolutely reversed, and that the Appellant shall have his Costs in respect of the last Tryal, and otherwise touching the Premises

Note, The Lady *Bridgeman* is no party to the Decree, and if she has lent any Money on a Security under the Decree, she can be in no better condition than he that had the Decree.

And she hath other Lands in Security for her Money, but suffers *Dey* to continue in Possession of the same.

J. Brockett

21 & 22 Decemb. 1678. Settlement by *William Thwaites*.

21 Aug. 1679. Will or Appointment of *William Thwaites*.

Note the word Return shews that the Estate was by the Settlement to go to *James* (and not to *Frances*) and unless it had been so it was not possible for *James* to pay 1000 l. to his two Sisters within two years.

* April. 80. *William Thwaites* dyed.

** Aug. 80. *Frances* his Wife proved his Will and dyed the same Month.

† Octob. 81. *Thomas* died without issue.

† Respondent *Frances* dwelling with her Mother got all the Writings and Married *Dey*.

§ Trin. 82. Bill in Exchequer by Respondents.

¶ Answer of *James Thwaites* by his Guardian.

Decree in the Exchequer 18 June, 1683.

25 April, 1690. Decree reversed.

14 June, 1690. Ejectment by *James Thwaites*.

That Tryal prevented by *Dey*.

1691. *Martha Thwaites* took possession under a Decree in Chancery affirmed by the Lords.

23 May, 1698. Lords Order.

23 March, 99. Lords Order.

And the said order is hereby confirmed by the Court of Chancery in the following manner

1701

The Court of Chancery do hereby certify that the said order is confirmed by the Court of Chancery in the following manner

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Tbwaites against Dey,

The Apellants Cafe

Minder

To be heard ~~Friday~~ the 8th of May, 1701.

And the Appellants

1
James Dey

1
James Dey

1
James Dey

1
James Dey

William Trower pl Decree vs Wm Dey etc.

The Appellants Case

Decree

Herb. Trower
Jm Dey
James Trower Decree
(20th and Her) of
James Trower and James

Appellants

vs Wm Dey

John Dey and James

Respondents